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NO. 82 7019

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JAMES SECREST, APPELLANT

v.

STATE OF SOUTH DAKOTA

ON APPEAL FROM THE SUPREME COURT OF SOUTH DAKOTA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the South Dakota third degree burglary statute, SDCL 22-32-8, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, in that a person convicted of third degree burglary is guilty of a felony and a person convicted of violating SDCL 22-32-16, unlawful entry, is guilty of a misdemeanor while the conduct proscribed by both statutes is identical?

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of South Dakota (App. A, infra, 1a-7a) is reported at 331 N.W.2d 580. The opinion of the Circuit Court, Second Judicial Circuit in and for Minnehaha County, South Dakota, (App. B, infra, 8a-13a) is not reported.

JURISDICTION

This is an appeal from a final judgment entered pursuant to the decision of the Supreme Court of the State of South Dakota affirming the conviction of the Appellant for

third degree burglary (SDCL 22-32-8). Judgment was deemed to have been entered on March 30, 1983, when the decision of the Supreme Court of South Dakota was docketed by the Clerk of that Court. Notice of Appeal was filed with the Clerk of that Court on June 28, 1983. This Court has jurisdiction of this appeal by virtue of 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall - - - deny to any person within its jurisdiction, the equal protection of the laws."

SDCL 22-32-8 provides:

> "Third degree burglary defined - Felony. Any person who enters or remains in an unoccupied structure, with intent to commit any crime therein, is guilty of third degree burglary. Third degree burglary is a Class IV felony."

SDCL 22-32-16 provides:

> "Entry of structure to commit any crime as misdemeanor. Any person who, under circumstances not amounting to burglary, enters a structure with intent to commit any crime, is guilty of a Class I misdemeanor."

STATEMENT OF THE CASE

An Information charging James Secrest with third degree burglary was filed in the Office of the Minnehaha County, South Dakota, Clerk of Courts on June 4, 1981, as was a Part II habitual offender information. Mr. Secrest was

arraigned on the third degree burglary information on June 4, 1981, and entered a plea of not guilty.

On June 19, 1981, Mr. Secrest filed a motion to dismiss the information in the Second Circuit Court in and for Minnehaha County, South Dakota. By that motion, he challenged the constitutionality of SDCL 22-32-8, arguing that the statute denies him due process of law and the equal protection of the laws in violation of the United States and the South Dakota Constitutions. This claim was based upon the fact that SDCL 22-32-16 defines and prohibits the identical crime as that under which the Defendant was charged, yet a violation of SDCL 22-32-16 is a misdemeanor. The Circuit Court denied the Appellant's motion on August 21, 1981. (App. B, infra). The matter was tried to a jury which found the Appellant guilty of third degree burglary on September 16, 1981. On September 17, 1981, the Appellant was sentenced to 25 years in the South Dakota Penitentiary, having been convicted by the Court on the habitual offender information on that date.

An appeal to the South Dakota Supreme Court was perfected on October 14, 1981. The South Dakota Supreme Court decided the case on the briefs which were submitted by both parties, and entered an Order on March 30, 1983, affirming the conviction. (App. C, infra).

THE FEDERAL QUESTION IS SUBSTANTIAL

This appeal raises the question whether two state statutes proscribing identical criminal conduct, violate the equal protection clause of the Fourteenth Amendment of the United States Constitution when a conviction of one statute is a felony and a conviction under the other statute is a misdemeanor.

The South Dakota Supreme Court has determined that SDCL 22-32-8 and SDCL 22-32-16 prohibit identical conduct. (App. A, infra, 4a). Moreover, in State v. Blakey, 332 N.W.2d 729 (SD, 1983), a case involving the South Dakota first degree burglary statute[1], decided after the instant case, the State Supreme Court said, at 731 "the two elements absent from SDCL 22-32-16 which are present in first degree burglary, are 'occupied' and 'in the nighttime'."

The elements which distinguish first degree burglary from SDCL 22-32-16, are the same elements which distinguish it from third degree burglary.

---

[1]SDCL 22-32-1 provides: First degree burglary defined - Felony. Any person who enters or remains in an occupied structure, with intent to commit any crime therein, is guilty of first degree burglary when:
(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;
(2) The offender is armed with a dangerous weapon; or
(3) The offense is committed in the nighttime.
First degree burglary is a Class 2 felony.

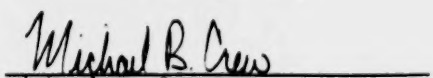
In sustaining the Appellant's conviction below against the equal protection claim, the South Dakota Supreme Court relied in substantial part upon this Court's opinion in United States v. Batchelder, 442 U.S. 114, 60 L.Ed.2d 755, 99 S.Ct. 2198 (1979). However, there is a crucial distinction between the statutes construed in the Batchelder case (18 U.S.C. §922(h) and 18 U.S.C. App. §1202(a)) and the statutes relevant to this matter. The statutes in the Batchelder case define and proscribe crimes which are overlapping while the statutes in the instant action define and proscribe crimes which are congruent.

Where the same act, committed under the same circumstances, is punishable either as a felony or a misdemeanor, and the elements of proof essential to either conviction are exactly the same, a conviction under the felony statute constitutes a violation of Defendant's right to the equal protection of the laws. Olsen v. Delmore, 295 P.2d 324 (Wash., 1956); People v. Calbaresi, 534 P.2d 316 (Colo., 1975); State v. Modica, 567 P.2d 420 (Hawaii, 1977); Holten v. State, 602 P.2d 1228 (Alaska, 1979).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,



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APPENDIX A

AUTHORIZED RELEASE
DATE: April 1, 1983
TIME: Noon

#13593-a-REM

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

STATE OF SOUTH DAKOTA, Plaintiff and Appellee,

v.

JAMES SECREST, Defendant and Appellant.

* * * *

APPEAL FROM THE CIRCUIT COURT OF THE

SECOND JUDICIAL CIRCUIT

MINNEHAHA COUNTY, SOUTH DAKOTA

* * * *

HONORABLE ROBERT C. HEEGE
Judge

* * * *

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* * * *

CONSIDERED ON BRIEFS
September 7, 1982

OPINION FILED MAR 30 1983

APPENDIX A

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MORGAN, Justice.

This appeal arises from a third-degree burglary conviction and a habitual offender conviction. We affirm.

Shortly before midnight on May 8, 1981, Randy and Nancy Sigler, observed from their car a man sticking his hand in a window of the Army Surplus Store in Sioux Falls, South Dakota. They drove down the street and as they turned around they saw the man walk around the corner of the surplus store carrying two new pair of boots. As Siglers' car approached the store again, they watched the man for approximately thirty seconds. Although Siglers were able to identify the man's clothing, they were unable to see his face. Mr. Sigler then reported the burglary. After arriving at the scene, the investigating police officers discovered sales tags from two pairs of boots, one pair of new boots and one pair of used shoes near the surplus store. One of the sales tags matched the new boots; the other sales tag belonged to "banana boots." During the investigation, James Secrest, appellant (Secrest), walked near the store. One of the officers noticed that he was wearing banana boots and that the paint on his pants matched the paint on the used shoes found near the surplus store. After talking with Secrest, the officer arrested him for the burglary.

Secrest was found guilty by a jury of burglary in the third degree and subsequently, the court found him guilty of being an habitual offender and sentenced him to twenty-five years in the South Dakota State Penitentiary. Secrest appeals, claiming that South Dakota's third-degree burglary statute violates the equal protection clause of the United States Constitution.

The United States Constitution, Amendment 14, provides, in pertinent part:

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> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1 (emphasis supplied). The Equal Protection Clause as provided in the South Dakota Constitution, states:

> No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations.

S.D. Const. art. VI, § 18. As provided in our federal and state constitutions, the Equal Protection Clause requires that every person's rights must be governed by the same rule of law under similar circumstances and, in administering criminal justice, imposing different punishments or different degrees of punishment upon one person than is imposed upon all others for like offenses is a denial of such right. State v. King, 82 S.D. 514, 149 N.W.2d 509 (1967). See Commonwealth of Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 58 S.Ct. 59, 82 L.Ed. 43 (1937); Finley v. State of California, 222 U.S. 28, 32 S.Ct. 13, 56 L.Ed. 75 (1911); Hawker v. State of New York, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898); Moore v. State of Missouri, 159 U.S. 673, 16 S.Ct. 179, 40 L.Ed. 301 (1895).

Secrest was convicted of third-degree burglary. The third-degree burglary statute, SDCL 22-32-8, provides: "Any person who enters or remains in an unoccupied structure, with intent to commit any crime therein, is guilty of third degree burglary. Third degree burglary is a Class 4 felony." The maximum punishment for a Class 4 felony is ten years in the penitentiary and a $10,000 fine. SDCL 22-6-1(6). Secrest claims the same conduct prohibited by the third-degree burglary statute, SDCL 22-32-8, is also prohibited by the unlawful entry statute,

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SDCL 22-32-16. That statute, SDCL 22-32-16, provides: "Any person who, under circumstances not amounting to burglary, enters a structure with intent to commit any crime is guilty of a Class 1 misdemeanor." The maximum penalty for a Class 1 misdemeanor is one year in a county jail and a $1000 fine. SDCL 22-6-2(1). Secrest argues because these statutes* prohibit "identical" conduct with different penalties, that two individuals committing identical acts may receive different punishments. Accordingly, he contends these statutes violate the equal protection clause.

The Fourteenth Amendment Equal Protection Clause prohibits selective enforcement "based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446, 453. See State v. O'Connor, 265 N.W.2d 709 (S.D. 1978). To avoid prosecution for a criminal offense

---

* We note that this is the first time we have addressed both of these specific statutes, SDCL 22-32-8 and 22-32-16. Although burglary and unlawful entry statutes have previously been before us under the issue of lesser-included offenses, these previous cases dealt with either the predecessor statutes, State v. O'Connor, 265 N.W.2d 709 (S.D. 1978); State v. Kafka, 264 N.W.2d 702 (S.D. 1978); State v. Celli, 263 N.W.2d 145 (S.D. 1978); State v. Myott, 246 N.W.2d 786 (S.D. 1976); see United States v. Two Bulls, 577 F.2d 63 (8th Cir. 1978), or with the first-degree burglary statute, SDCL 22-32-1 State v. Poss, 298 N.W.2d 80 (S.D. 1980); State v. Wilson, 297 N.W.2d 477 (S.D. 1980). Due to the substantial revision of the Criminal Code in 1976 and the indisputably separate elements of the first-degree burglary statute, these cases are clearly distinguished from the case at hand.

Additionally, this court has reviewed the present third-degree burglary statute, SDCL 22-32-8, in State v. Blair, 273 N.W.2d 187 (S.D. 1979), State v. Erdmann, 292 N.W.2d 97 (S.D. 1980), and in State v. Cloud, 324 N.W.2d 287 (S.D. 1982). Blair, supra, and Erdmann, supra, discussed the issue whether SDCL 22-32-8 requires unauthorized entry. We held that consent to enter is irrelevant in the charge of third-degree burglary. In Cloud, we discussed that the open uncovered box of a pickup truck constitutes a "structure" as an element of third-degree burglary. The unlawful entry statute, however, was not raised in Blair, Erdmann, or Cloud.

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upon equal protection grounds, a defendant must show that the government exercised selective enforcement of the law upon an invidious discriminatory basis. United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979); Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604, reh. den. 435 U.S. 918, 98 S.Ct. 1477, 55 L.Ed.2d 511 (1978); United States v. Chagra, 669 F.2d 241 (5th Cir. 1982); United States v. Amon, 669 F.2d 1351 (10th Cir. 1981); Harrington v. United States, 673 F.2d 7 (1st Cir. 1982). State v. Bartlett, 210 Neb. 886, 317 N.W.2d 102 (1982); State v. Karpinski, 92 Wis.2d 599, 285 N.W.2d 729 (1979).

In support of this contention, Secrest cites State v. Pirkey, 203 Or. 697, 281 P.2d 698 (1955). In Pirkey, the Oregon Supreme Court reviewed a statute which authorized the prosecution of insufficient funds checks as either a felony or misdemeanor to be determined by the grand jury or the magistrate. The Oregon Court apparently found the defendant was discriminated against since he was a "person or . . . [member of a class] in a criminal case." Id. at 702. Since the statute did not provide standards by which to determine when an accused is to be charged with a felony or a misdemeanor, the Oregon court held the statute unconstitutional as a violation of equal protection.

We note that Pirkey was decided prior to United States v. Batchelder, supra, where the Supreme Court addressing similar constitutional questions held federal statutes valid. In Batchelder, the Court recognized the long-standing rule that when an action violates two criminal statutes, the government may prosecute under either, providing it does not discriminate against any class of defendants. See Oyler v. Boles, supra, United States v. Naftalin, 441 U.S. 768, 99 S.Ct. 2077, 60 L.Ed.2d 624 (1979). Although what charges to file are matters within a

prosecutor's discretion, Bordenkircher v. Hayes, supra; United States v Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), such selection is, of course, subject to constitutional restraints such as the equal protection clause. United States v. Batchelder, supra; United States v. Amon, supra. Further, the fact that a prosecutor may be influenced by the penalties available for the charges does not alone give rise to a violation of the Equal Protection Clause. United States v. Batchelder, supra; Oyler v. Boles, supra. To demonstrate a violation of the Equal Protection Clause, a defendant must prove selective enforcement based upon an arbitrary classification such as race, sex or religion. After the Supreme Court's decision in Batchelder, the Oregon Supreme Court in City of Klamath Falls v. Winters, 289 Or. 757, 619 P.2d 217 (1980), stated that the United States Supreme Court in Batchelder apparently disagreed with the reasoning in Pirkey.

We have also interpreted our state's equal protection clause as prohibiting selective enforcement based upon an unreasonable or arbitrary classification. Berens v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 80 S.D. 168, 120 N.W.2d 565 (1963). In Berens we held that "where the legislature exercises its police power, and a classification is made that is reasonable and not arbitrary, there is no denial of equal protection of the laws." 80 S.D. at 174, 120 N.W.2d at 569. Similarly, in State v. King, 82 S.D. 514, 149 N.W.2d 509 (1967), we held a classification within a criminal statute reasonable. The statute we reviewed in King made the offense of escape or attempt to escape by one imprisoned for term less than life punishable by imprisonment for not more than five years. Although no penalty was provided for a prisoner sentenced to life, we held the classification was reasonable since a pardon or commutation of a

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life sentence is a privilege, not a right and that "an escape by a life termer would be a material aspect in determining when, if ever, the prisoner would merit executive clemency." 82 S.D. at 518, 149 N.W.2d at 511. We further noted that in determining the legislative purpose of this classification, this court would not concern itself with the expediency of a legislative measure. In Berens, supra, and King, supra, this court reviewed the statutes under the United States' and South Dakota's Constitutions and concluded that neither statute violated the equal protection provisions. In the present case, we are deciding the equal protection issue under both the federal and state constitutions.

Secrest does not state that the prosecutor's decision to charge him with third-degree burglary was deliberately based upon an unjustifiable standard or classification. Secrest merely points to the possibility of selective enforcement as the basis for his claim of violation of equal protection. Since the conscious exercise of selective enforcement is not in itself a constitutional violation, Oyler v. Boles, supra; United States v. Batchelder, supra, and Secrest does not claim nor is there apparent from the facts before us, any unjustifiable standard or classification used in this selective enforcement, we conclude that the statutes before us do not violate the federal and state constitutional guarantee of equal protection.

We affirm.

All the Justices concur.

APPENDIX B

CIRCUIT COURT OF SOUTH DAKOTA
SECOND JUDICIAL CIRCUIT
SIOUX FALLS, SOUTH DAKOTA 57102
TELEPHONE 605 339 6511

ROBERT C. HEGE
Judge

DEBORAH CONRAD-BUCKMAN
Court Reporter

August 21, 1981

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Deputy States Attorney
States Attorney Office
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Sioux Falls, South Dakota 57102

-and-

Michael B. Crew
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Re: State of South Dakota v. James Secrest Cr 81-147

Gentlemen:

Defendant has been charged with the commission of third degree burglary SDCL 22-32-8). Defendant has filed a Motion to Dismiss on the ground that the burglary statutes are unconstitutional. Defendant claims that the conduct prohibited by the unlawful entry statute (SDCL 22-32-16) and the burglary statutes (SDCL 22-32-1, 2 and 8) is identical. Defendant argues that the identity of the statutes could render a situation wherein the same identical act, under the same circumstances, may constitute a felony when committed by one person, and a misdemeanor when committed by another. Because this possibility exists, defendant claims that his constitutional rights of due process and equal protection have been violated.

The issue of the constitutionality of the first and second degree burglary statutes is not properly before this Court. The South Dakota Supreme Court, in State v. Reed, 63 N.W.2d 803, 804 (1954) stated that "it is not a proper exercise of the judicial function . . . to determine the constitutionality of legislation when invalidity is urged by one not adversely affected." As the defendant is charged only with third degree burglary, he is not "adversely affected" by the other burglary statutes.

APPENDIX B

Re: State of South Dakota v. James Secrest CR 81-147

This Court need not resolve the question of whether the conduct proscribed by the third degree burglary statute is identical with the conduct proscribed by the unlawful entry statute in order to hold that the burglary statute is constitutional. Even if the conduct prohibited is identical (no opinion is offered by the Court on this matter), the rationale of United States v. Batchelder, 442 U.S. 114, 60 L.ed.2d 775, 99 S.Ct. 2198 (1979), allows this Court to hold that the identity of the statutes violates neither the due process nor equal protection guarantees of either the United States or South Dakota Constitutions.

United States v. Batchelder

In Batchelder, the United States Supreme Court considered overlapping provisions of the Omnibus Crime Control Act and the Safe Streets Act of 1968. Both Acts prohibited felons from receiving firearms, but each statute authorized different maximum penalties. The Defendant argued that it was unconstitutional to sentence him under the harsher statute; that he was entitled to be sentenced under the more lenient provision. The Court of Appeals held that punishment under the harsher provision was unconstitutional. The Supreme Court reversed.

Both the Supreme Court and Court of Appeals noted that the statutes involved were not identical. However, both Courts also indicated that there was no substantive differences between the statutes as applied to the convicted felon who receives a firearm. Id. at 118. In other words, both Courts treated the statutes as being identical for the purposes of the controversy before them. Thus, the rationale of Batchelder is directly applicable to the case at bar.

Due Process Claim

As the Batchelder Court noted, "'no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'" Id. at 123 (Cites omitted) Thus, a criminal statute must give fair notice that a type of conduct is forbidden. Id. Additionally, "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." Id. (Cites omitted)

In the case at bar, the statutes being considered violate

none of these fundamental principles. The statutes are clear and understandable, and a person of average intelligence would have fair notice of what type of conduct is prohibited. The sentencing provisions of both statutes are also clear and understandable, and, again, a person of average intelligence would have notice of the consequences of his actions. On this issue, the Supreme Court concluded:

> Although the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments. So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied. Id.

For the same reasons, there has been no violation of the notice requirements of the Due Process Clause in the present case.

Equal Protection Claim

The Batchelder Court noted the settled rule that "when an act violates more than one criminal statute, the government may prosecute under either so long as it does not discriminate against any class of defendants." Id. In the Batchelder Court of Appeals view however, when two statutes prohibit the identical conduct, the prosecution's discretion in choosing which punishments to apply would be "unfettered." Id. at 124, citing United States v. Batchelder, 581 F.2d 626, 633 and n.11 (7th Cir. 1978).

The Supreme Court dismissed this argument as "factually and legally unsound." United States v. Batchelder, 442 U.S. at 124. First, the Court noted, a prosecutor never has "unfettered" discretion; he is always subject to constitutional constraints. However, the Equal Protection Clause prohibits selective enforcement only to the extent that it is based on an arbitrary classification, such as race, religion, and the like. Id. at 124, n.9. Secondly, the prosecution does not predetermine ultimate criminal sanctions; rather, it is the function of the judiciary to mete out punishment. Lastly, the Court stated that

> there is no appreciable difference between the discretion a prosecutor exercises when deciding

> whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements. In the former situation, one he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context. The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause. (Cites omitted) Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced. (Cited omitted). Id. at 125.

For the above stated reasons, the possibility of selective enforcement in the case at bar does not violate the provisions of the Equal Protection Clause.

In support of his position, defendant cites State v. Pirkey, 281 P.2d 698 (Ore. 1955). The Pirkey rationale is, however, directly contrary to that of Batchelder. The Oregon Supreme Court noted this contradiction, and overruled the Pirkey decision in City of Klamath Falls v. Winters, 619 P.2d 717, 231 (1980).

In his Reply Memorandum, defendant argues that the "legislature has abdicated its duty of determining the 'degrees of evil' between a felony burglary and a misdemeanor unlawful entry." The Batchelder Court of Appeals made a similar argument. It stated:

> Congress cannot be said to have abandoned its responsibility to set a penalty when it sets different penalties in overlapping statutes because in doing so it has set a different penalty for each legally distinguishable offense, but it has abandoned that responsibility, when as here, different penalties are applied to statutes prohibiting identical acts. (Cites omitted) United States v. Batchelder, 581 F.2d at 633.

The Supreme Court rejected this argument, stating that "[t]he provisions at issue plaintly demarcate the range of penalties that prosecutors and judges may seek and impose. In light of that specificity, the power that

Congress has delegated to those officials is no broader than the authority they routinely exercise in enforcing the criminal laws." United States v. Batchelder, 442 U.S. at 126. Likewise in the present case, the legislature has demarcated, with sufficient specificity, "the range of penalties that prosecutors and judges may seek and impose."

South Dakota Law

Although it has decided that the statutes under consideration do not violate the United States Constitution, this Court must also decide whether the South Dakota Constitution provides greater protection to the defendant. This Court is aware of the seemingly broad and sweeping statement regarding equal protection made in State v. King, 149 N.W.2d 509 (S.D. 1967), from which it could be argued that the Equal Protection Clause of the South Dakota Constitution is broader and offers greater protection than does the similar Clause in the United States Constitution. In that case, the South Dakota Supreme Court stated:

> Equal protection of the law requires that the rights of every person must be governed by the same rule of law under similar circumstances and, in the administration of criminal justice, the imposition of different punishments or different degrees of punishment upon one than is imposed upon all for like offenses is a denial of such right. Id. at 510.

In its application however, the protection offered is not nearly as broad as it appears on first blush. In State v. O'Connor, 194 N.W.2d (S.D. 1972), the defendant asserted that he was denied the equal protection of the law because under SDCL 22-32-9 and 22-32-16 (Predecessor statutes to the statutes considered in the present case) commission of identical acts could be treated differently under those statutes. One could be charged and convicted of a felony where the other could be charged and convicted of a misdemeanor. Id. at 250. (This Court is aware that the O'Connor Court also concluded that the statutes were not identical. But for the purpose of the equal protection argument, i.e., that identical conduct could result in different treatment, that conclusion by the O'Connor Court was inapposite to its decision on this issue.) The O'Connor Court then noted the language of King. In applying that language, however, the Court stated that the "[d]efendant has not demonstrated that he has been treated differently from anyone else in like circumstances and we will not reverse his conviction on the hypothetical contention that conceivably two persons under like circumstances could be charged with different offense- arising out of the same circumstances. Id.

(Emphasis added). In this case, there is no claim that the defendant has actually been treated differently, only that he could be treated differently.

More importantly, however, (assuming, arguendo, that, under King, the protection offered by the South Dakota Constitution is greater than that offered by the United States Constitution), it appears that the South Dakota Supreme Court has limited that protection to the extent that it is presently in full accord with the protection offered bu the United States Constitution. In State v. O'Brien, 272 N.W.2d 69 (S.D. 1978), the Court stated:

> Although the statements made by the former state's attorney indicate that the statute was seldom utilized, even lax, uneven, and selective enforcement of the statute would not show that it was unconstitutionally applied to defendant absent a showing that the particular "selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Id. at 73, citing Oyler v. Boles, 368 U.S. 448, 456, 7 L.Ed.2d 446, 453 (1962).

In State v. O'Connor, 265 N.W.2d 709, 714 (S.D. 1978), the South Dakota Supreme Court adopted the holding of Oyler v. Boles, supra, regarding equal protection, quoting the following excerpt:

> Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged. Id. at 456.

Having determined that the scope of the Equal Protection Clauses of the South Dakota and United States Constitution are the same, and having further determined that identical statutes with different penalties would not violate the United States Constitution, this Court denies the Defendant's Motion to Dismiss.

Yours very truly,

Robert C. Heege
Circuit Judge

APPENDIX C

Cr. 81-141

Appeal No. 13593

IN THE SUPREME COURT
State of South Dakota } ss.

March 30, 19 83

Present: Chief Justice Jon Fosheim and Associate Justices Roger L. Wollman, Francis G. Dunn, Robert E. Morgan and Frank E. Henderson.

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

JAMES SECREST,

Defendant and Appellant.

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

MAR 30 1983

Gloria J. Engel
Clerk

This cause coming on to be heard upon the merits of the cause, oral argument having been dispensed with by the Court,

and the Court having advised thereon and filed its decision in writing, now, therefore,

IT IS CONSIDERED, ORDERED AND ADJUDGED that the Judgment of the Circuit Court, within and for Minnehaha County, appealed from herein, be and the same is hereby affirmed.

AND IT IS FURTHER ORDERED that this cause be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

AND IT IS FURTHER ORDERED AND ADJUDGED that no costs be taxed.

(SEAL)

Attest: Gloria J. Engel
Clerk of the Supreme Court

By ..... Deputy

By the Court: Jon Fosheim
Chief Justice

APPENDIX D

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

JAMES SECREST, Appellant, vs. STATE OF SOUTH DAKOTA,	SUP. CT. #13593 NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that James Secrest, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of South Dakota, affirming the Judgment of Conviction entered herein on March 30, 1983.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: June 27, 1983.

Michael B. Crew

Michael B. Crew
Attorney for Appellant
226 North Phillips, Suite 200
P. O. Box 1164
Sioux Falls, SD 57101

CERTIFICATE OF SERVICE

Michael B. Crew, the undersigned, does hereby certify that on the 27th day of June, 1983, he mailed true and

correct copies of the foregoing Notice of Appeal to the Supreme Court of the United States in the above captioned matter, by first class mail, postage affixed, and directed to the following:

Mr. Roger D. Moan
Minnehaha County Clerk of Court
Minnehaha County Courthouse
Sioux Falls, SD 57102

Mr. Mark V. Meierhenry
Attorney General
State Capitol
Pierre, SD 57501

Mr. Joaquin Hanson
Minnehaha County State's Attorney
Minnehaha County Courthouse
Sioux Falls, SD 57102

Michael B. Crew
Michael B. Crew

This Notice of Appeal was filed in the Office of the Clerk of the Supreme Court of the State of South Dakota on June 28, 1983.

82-7019

NO. ____

Office - Supreme Court, U.S
FILED
AUG 1 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JAMES SECREST,

Appellant,

v.

STATE OF SOUTH DAKOTA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF SOUTH DAKOTA

MOTION TO DISMISS

MARK V. MEIERHENRY
ATTORNEY GENERAL

Richard Dale
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501-5090
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NO. ____

IN THE

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Appellee.

ON APPEAL FROM THE SUPREME COURT
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MOTION TO DISMISS

COMES NOW the Appellee and hereby moves the Court to dismiss the appeal herein from the

judgment of the Supreme Court of South Dakota on the ground that no substantial federal question is involved.

I

THE CONSTITUTIONAL PROVISION, STATE STATUTES INVOLVED AND THE NATURE OF THE CASE.

A. THE STATE STATUTES AND CONSTITUTIONAL PROVISION.

This appeal raises the question whether the prosecution of an individual for third degree burglary under SDCL 22-32-8, instead of under SDCL 22-32-16 for unlawful entry, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

SDCL 22-32-8 provides as follows:

> Any person who enters or remains in an unoccupied structure, with intent to commit any crime therein, is guilty of third degree burglary. Third degree burglary is a Class 4 felony.

SDCL 22-32-16 provides that:

> Any person who, under circumstances not amounting to burglary, enters a structure with intent to commit any crime, is guilty of a Class 1 misdemeanor.

Section 1 of the Fourteenth Amendment to the United States Constitution provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. PROCEEDINGS BELOW.

On June 4, 1981, Informations charging the Appellant with third degree burglary and with being an habitual offender, were filed with the Circuit Court of the Second Judicial Circuit, Minnehaha County, South Dakota. The Appellant was tried and found guilty by a jury in the circuit court on September 16, 1981, of burglary in the third degree and, on the following day, trial was had to the court on the habitual offender charge. The Circuit Court found Appellant guilty of being an habitual offender and

sentenced him to 25 years imprisonment at the South Dakota State Penitentiary.

The Appellant appealed his third degree burglary conviction to the South Dakota Supreme Court and that Court, on March 30, 1983, affirmed the Circuit Court's decision. The opinion of the South Dakota Supreme Court is State of South Dakota v. James Secrest, 331 N.W.2d 580 (S.D. 1983).

C. STATEMENT OF FACTS.

During the late night hours of May 8, 1981, the Army Surplus store in Sioux Falls, South Dakota, was burglarized. The Appellant was arrested and charged with third degree burglary, petty theft, and with being an habitual offender. The petty theft charge was dismissed upon the motion of the State's Attorney.

Appellant filed a pretrial motion to dismiss the information against him on the ground that the South Dakota burglary statutes are unconstitutional. Appellant claimed that the third degree

burglary statute, SDCL 22-32-8, violation of which is a felony, prohibited the identical conduct as that proscribed by SDCL 22-32-16, which sets out the elements of unlawful entry, a misdemeanor. Appellant claimed that his being charged under the third degree burglary statute violated his rights to equal protection and due process of law. The Circuit Court denied Appellant's motion, and his conviction and subsequent appeals to the Supreme Court of South Dakota and this Court followed.

II

THE CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

ARGUMENT

The Appellant's contention that South Dakota's third degree burglary statute, SDCL 22-32-8, and unlawful entry statute, SDCL 22-32-16, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because violation of the burglary

statute is a felony while violation under the other is a misdemeanor, has no merit.

The Appellant asserts that his constitutional right to equal protection of the law has been abridged by his being charged and convicted under South Dakota's third degree burglary statute. However, application of that statute to the Appellant implicated none of his constitutional rights.

The Equal Protection Clause of the Fourteenth Amendment prohibits selective enforcement of the criminal laws based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). The Appellant does not claim that he was prosecuted because of his membership in any racial, ethnic or religious group. He bases his equal protection argument on the fact that the prosecution decided to charge him with third degree burglary, a felony, instead of unlawful entry, a misdemeanor.

According to Appellant, both the third degree burglary and unlawful entry statutes proscribe identifical behavior and his being charged under the statute providing the harsher punishment violated Appellant's Fourteenth Amendment right to equal protection of the laws. The decisions of this Court indicate the lack of substance in Appellant's assertions.

This Court has long recognized that an individual whose conduct violates more than one criminal statute may be prosecuted under either statute, so long as no discrimation results to any class of defendants. United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755, 764 (1979); Oyler v. Boles, supra. Prosecutors have wide latitude, within constitutional limits, in deciding what charges, if any, to bring against an individual. United States v. Batchelder, supra; Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). "The conscious exercise of some selectivity in enforcement

is not in itself a federal constitutional violation so long as the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Bordenkircher v. Hayes, supra, 54 L.Ed.2d at 611, quoting Oyler v. Boles, supra, 7 L.Ed.2d at 453.

In addition, this Court has found no constitutional problems when overlapping criminal statutes are involved. United States v. Batchelder, supra. The decision to prosecute the Appellant under the burglary statute was within the discretion of the State's Attorney. Furthermore, Appellant's conduct was within that proscribed by the burglary statute and he makes no argument that he shouldn't have been charged with burglary. On the contrary, his contention is simply that to be charged with felony third degree burglary rather than misdemeanor unlawful entry results in the denial of equal protection. However, a defendant has no constitutional right

to choose which of two applicable statutes he will be indicted and prosecuted under, nor "is he entitled to choose the penalty scheme under which he will be sentenced." United States v. Batchelder, supra, 60 L.Ed.2d at 766. The Appellant offers no argument or evidence that others have engaged in acts similar to his, but were charged only with unlawful entry. He does not demonstrate the discriminatory, unequal treatment which is the basis for an equal protection challenge.

The lower federal courts and state courts have also rejected the contention that equal protection requires prosecution under the more lenient statute when two or more statutes prohibit similar conduct. See, e.g., United States v. Fern, 696 F.2d 1269 (11th Cir. 1983); United States v. Gordon, 548 F.2d 743 (8th Cir. 1977). South Dakota has recognized the great reach of

the Equal Protection Clause, State v. King, 82 S.D. 514, 149 N.W.2d 509 (1967), but, as this Court, has refused to reverse a conviction on the ". . . hypothetical contention that conceivably two persons under like circumstances could be charged with different offenses arising out of the same circumstances." State v. O'Connor, 86 S.D. 294, 300, 194 N.W.2d 246, 250 (1972).

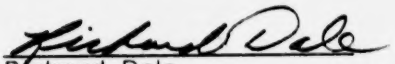
The Appellant has not shown any violation of his constitutional rights. The decision to charge the Appellant with third degree burglary was not motivated by a desire to discriminate against him, or for any other illegitimate reason. Nor does Appellant so argue. The State was constitutionally correct in charging Appellant with third degree burglary, a decision supported by the authorities cited above.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed.

Respectfully submitted,

MARK V. MEIERHENRY
ATTORNEY GENERAL



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UNITED STATES CONSTITUTION

AMENDMENT XIV

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBTS; ENFORCEMENT.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to the respective numbers, counting the whole number of

persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being 21 years of age, and citizens of the United States, or any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens 21 years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or is an officer of the

United States or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comform to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held to be illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

SDCL 22-32-8. Third degree burglary defined--Felony. Any person who enters or remains in an unoccupied structure, with intent to commit any crime therein, is guilty of third degree burglary. Third degree burglary is a Class 4 felony.

SDCL 22-32-16. Entry of structure to commit any crime as misdemeanor. Any person who, under circumstances not amounting to burglary, enters a structure with intent to commit any crime, is guilty of a Class 1 misdemeanor.